

## GETTING SERIOUS ABOUT USER-FRIENDLY MASS MARKET LICENSING FOR SOFTWARE

*Robert W. Gomulkiewicz\**

### INTRODUCTION

Software publishers use standard form end user licenses (“EULAs”) in mass market transactions on a regular basis. Most software users find EULAs perplexing and generally ignore them.<sup>1</sup> Scholars, however, have focused on them intently. In the past twenty years over a hundred scholarly articles have been written on the subject.<sup>2</sup> Most of these articles criticize EULAs and argue that courts should not enforce them.

In their critique of EULAs, some scholars examine the adequacy of the offer, acceptance, and consideration.<sup>3</sup> Others discuss EULAs as part of

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\* Director, Intellectual Property Law & Policy Program and Associate Professor of Law, University of Washington School of Law. I would like to thank my colleagues Steve Calandrillo, Sean O’Connor, and Kate O’Neill for helpful comments, and especially Jane Winn for her insights on Legal XML. Thanks also to Keith Aoki, Vince Chiapetta, Maggie Chon, Lydia Loren, Joe Miller, and Greg Silverman for helpful comments on an early draft that I presented at the Pacific Intellectual Property Scholars Conference. I am grateful to James Allan, Sarah Hollingsworth, Jim Jantos, Jolene Marshall, Divya Verma, and Mary Whisner for research assistance, as well as the Shidler Center for Law, Commerce & Technology for research funding.

<sup>1</sup> Scott J. Burnham, *How to Read a Contract*, 45 ARIZ. L. REV. 133, 133 (2002) (“Whether the document is found on the computer screen or the printed page, the reader would prefer to click or sign, taking a chance on the terms of surrender, rather than read it.”).

<sup>2</sup> A search of the term “shrink wrap license” on Westlaw returns a list of 116 law review articles written between 1984 and 2004. *See also* Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335, 336 (1996) (listing 15 articles published between the years 1985 and 1995) [hereinafter Gomulkiewicz & Williamson, *Brief Defense of Mass Market License Agreements*]. In 1996, the Seventh Circuit decided the seminal case on mass market licenses, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). The *ProCD* decision stimulated many additional articles, as did the process to create the model licensing statute known as the Uniform Computer Information Transactions Act (formerly known as U.C.C. Article 2B). *See, e.g.*, Robert W. Gomulkiewicz, *The License Is the Product: Comments on the Promise of Article 2B for Software and Information Licensing*, 13 BERKELEY TECH. L. J. 891 (1998) [hereinafter Gomulkiewicz, *The License Is the Product*]; Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 113 (1999); Apik Minassian, *The Death of Copyright: Enforceability of Shrinkwrap Licensing Agreements*, 45 UCLA L. REV. 569 (1997); J. Thomas Warlick, IV, *A Wolf in Sheep’s Clothing? Information Licensing and De Facto Copyright Legislation in UCC 2B*, 45 J. COPYRIGHT SOC’Y U.S.A. 158 (1997).

<sup>3</sup> *See, e.g.*, Jeff C. Dodd, *Time and Assent in the Formation of Information Contracts: The Mischief of Applying Article 2 to Information Contracts*, 36 HOUS. L. REV. 195 (1999); David A. Einhorn, *Box-Top Licenses and the Battle-of-the-Forms*, 5 SOFTWARE L.J. 401 (1992); Richard H. Stern, *Shrink-*

the troublesome issue of standard form contracting, and whether standard forms, on balance, harm or benefit consumers.<sup>4</sup> Still others focus on the intellectual property-contract law interplay.<sup>5</sup> These issues are important to be sure, but there is little left to say. The issues have been talked to death.

Despite all the scholarly debate, one important reality remains: EULAs are here to stay for the foreseeable future.<sup>6</sup> Courts, by and large, have enforced EULAs, provided the software publisher gives the user a reasonable opportunity to review and the user makes a meaningful manifestation of assent.<sup>7</sup> Given this reality,<sup>8</sup> it is crucial to address an issue that scholars have thus far ignored: what can be done to make licensing more “user-friendly?”<sup>9</sup> Specifically, what can be done to help people better understand

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*Wrap Licenses of Mass Marketed Software: Enforceable Contracts or Whistling in the Dark?*, 11 RUTGERS COMPUTER & TECH. L. J. 51 (1985); Michael Ryan, Note, *Offers Users Can't Refuse: Shrink-Wrap License Agreements as Enforceable Adhesion Contracts*, 10 CARDOZO L. REV. 2105 (1989).

<sup>4</sup> See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).

<sup>5</sup> See, e.g., Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1318-21, 1345-46 (2003) (criticizing the use of mass market licenses for data and information but praising their use for open source software); Dennis J. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511 (1997); Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025 (1998); Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827 (1998); Maureen A. O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53 (1997).

<sup>6</sup> See Hillman & Rachlinski, *supra* note 4.

<sup>7</sup> See, e.g., *Bowers v. Baystate Techs.*, 302 F. 3d 1334 (Fed. Cir. 2002); *Specht v. Netscape Communications, Corp.*, 306 F. 3d 17 (2d Cir. 2002) (approving some mass market license transactions and not others); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (mixed computer hardware and software consumer transaction); *ProCD, Inc.*, 86 F.3d at 1447; *Storm Impact v. Software of the Month Club*, 13 F. Supp. 2d 782 (N.D. Ill. 1998); *Hotmail Corp. v. Van\$ Money Pie, Inc.*, 47 U.S.P.Q.2d 1020 (N.D. Cal. 1998) (court assumes enforceability of mass market license); *Arizona Retail Sys., Inc., v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993) (holding a mass market license enforceable in the initial transaction between a value added reseller and a software publisher, but unenforceable in a subsequent transaction); *Brower v. Gateway 2000*, 676 N.Y.S.2d 569 (1998) (mixed computer hardware and software transaction); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305 (Wash. 2000). *But see* *Step-Saver Data Sys. v. Wyse Tech., Inc.*, 939 F.2d 91 (3d Cir. 1991) (refusing to enforce EULA in transaction between distributor and value-added reseller); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988).

<sup>8</sup> See Michael Rustad & Lori E. Eisenschmidt, *The Commercial Law of Internet Security*, 10 HIGH TECH. L.J. 213, 292 (1995) (reporting that two-thirds of software company lawyers believe shrink wrap licenses should be enforceable).

<sup>9</sup> I use the word “friendly” and the term “user-friendly” to mean that a license communicates information effectively and presents fair terms to the user. The Oxford English Dictionary defines “friendly” as: “disposed or likely to be helpful,” “not jarring or conflicting,” “in computing, easy and convenient to use . . . designed with the needs of users in mind.”

the terms and conditions of EULAs, and what can be done to encourage software publishers to craft simpler, fairer, more understandable licenses?

Part I of the article summarizes the heated debate about the use of mass market licenses in software transactions. Part II describes the typical contract-drafting process that leads to the creation of an unfriendly EULA. Part III argues that although software users and publishers share an interest in user-friendly licenses, serious obstacles get in the way. Parts IV through X then explore a series of ways to overcome these obstacles.

First, the article explores the ways that lawyers and the software publishers that they work for can craft more readable EULAs. Second, it addresses the positive role that law school education could play in training lawyers to craft more user-friendly EULAs. Third, it describes how technology such as “shopbots” and XML can make EULAs more user-friendly by helping software purchasers find EULAs with the terms they want. Fourth, it comments on the advisability of applying “plain language” legislation to EULAs as a way of inducing software publishers to improve EULAs.

The article concludes that the most powerful way to improve the user-friendliness of licensing is through new public interest non-government organizations (“EULA NGOs”) which use the mass communications capabilities of the World Wide Web.<sup>10</sup> Using the Web, a EULA NGO could provide objective, expert, easy-to-read commentary on the pros and cons of particular EULAs to assist users in their purchasing decisions. A EULA NGO could also provide constructive feedback to software publishers about how to improve their licenses and describe and promote licensing best practices.

Moreover, a EULA NGO’s commentary would create a valuable record of public comment about individual EULAs. This record could be used by a court in the event a user challenges or a software publisher attempts to uphold the enforceability of a EULA. The very existence and easy availability of this public record will provide a strong incentive for software publishers to improve the friendliness of their licensing.

## I. A WHIRLWIND TOUR OF THE EULA DEBATE

Software publishers began using EULAs during the personal computer revolution. Software licensing existed prior to that time, but software was not a mass market product and the use of standard form contracts was unnecessary.<sup>11</sup> The transition to EULAs was unremarkable.<sup>12</sup> Standard form

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<sup>10</sup> The organization would be akin to a Consumers Union for EULAs.

<sup>11</sup> See Gomulkiewicz & Williamson, Brief Defense of Mass Market License Agreements, *supra*

contracts are common;<sup>13</sup> indeed, modern commerce could not function effectively without them.<sup>14</sup>

Software publishers use EULAs for a variety of important reasons. First, EULAs allow them to license various packages of rights to users at various price points.<sup>15</sup> For example, a software publisher might license word processing software to business users for one price, to home users for a lower price, academic institutions for an even lower price,<sup>16</sup> and to charitable organizations for free.<sup>17</sup> Certain types of software, such as server software and developer tools, must be licensed to be useful—a Copyright Act “first sale” does not provide sufficient rights.<sup>18</sup> Software publishers use licensing to foster innovative software developments such as “open source” software.<sup>19</sup> Open source EULAs grant broad rights to make and distribute derivative works.<sup>20</sup>

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note 2, at 338-41; Michael J. Madison, *Reconstructing the Software License*, 35 LOY. U. CHI. L.J. 275, 291 (2003).

<sup>12</sup> There are, to be sure, some important differences between mass market software licenses and standard form contracting in other industries, but those differences often favor end users. See Gomulkiewicz, *The License Is the Product*, *supra* note 2, at 898; Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 757 (2002).

<sup>13</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981); E.A. FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.26 (2d ed. 1990).

<sup>14</sup> See Todd A. Radkoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1218-25 (1983); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529-30 (1971) (standard form contracts “probably account for more than ninety-nine percent of all the contracts now made”).

<sup>15</sup> See Gomulkiewicz, *The License Is the Product*, *supra* note 2, at 896.

<sup>16</sup> See *Adobe Sys. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086 (N.D. Cal. 2000).

<sup>17</sup> See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO A NETWORK ECONOMY*, 19-83 (1999).

<sup>18</sup> Software tools usually come with sample code, libraries, and other code that a programmer uses as a starting point to write a software program. The programmer needs a license from the software tool publisher to create derivative works and to distribute the derivative works and the redistributable code included in the toolkit. See Gomulkiewicz & Williamson, *Brief Defense of Mass Market License Agreements*, *supra* note 2, at 363-64. Use of server software often entails making multiple copies of the server software, client software, and various other administrative software that comes with the package. See discussion *infra* Part V.A.

<sup>19</sup> See generally Robert W. Gomulkiewicz, *How Copyleft Uses License Rights to Succeed in the Open Source Software Revolution and the Implications for Article 2B*, 36 HOUS. L. REV. 179 (1999) [hereinafter Gomulkiewicz, *How Copyleft Uses License Rights*]; David A. McGowan, *Legal Implications of Open-Source Software*, 2001 U. ILL. L. REV. 241 (2001); Stephen M. McJohn, *The Paradoxes of Free Software*, 9 GEO. MASON L. REV. 24 (2000); Christian H. Nandan, *Open Source Licensing: Virus or Virtue?*, 10 TEX. INTELL. PROP. L.J. 349 (2002); Daniel B. Ravicher, *Facilitating Collaborative Software Development: The Enforceability of Mass-Market Public Software Licenses*, 5 VA. J.L. & TECH. 11 (2000).

<sup>20</sup> See, e.g., Free Software Foundation, *The GNU General Public License*, § 6 (June 1991), avail-

EULAs also serve the practical purpose of explaining to users what can and cannot be done with the software.<sup>21</sup> Even unfriendly EULAs do this to a degree, but most EULAs do far less than they should or could, which is the impetus for this article.

Although software publishers see the value of EULAs, scholars object to them for many reasons.<sup>22</sup> Their arguments may be summarized as follows: the contract formation process is flawed;<sup>23</sup> the “take it or leave it” nature of the process is unfair;<sup>24</sup> the “pay first, terms come later” sequence of events is flawed and unfair; it is too easy to hide terms; the method of contracting improperly extends intellectual property protection;<sup>25</sup> this use of contracts is preempted either by the Copyright Act or the United States Constitution.<sup>26</sup>

Courts, by and large, have enforced EULAs, unless the software publisher failed to give the potential user a reasonable opportunity to review the license<sup>27</sup> or the user did not make a meaningful manifestation of assent.<sup>28</sup> Judicial construction of EULAs has gone about the same way as

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able at <http://www.fsf.org/licenses/licenses.html#TOCGPL>; UNIVERSITY OF CALIFORNIA, *BSD License*, available at <http://www.opensource.org> (license grant section). See generally Gomulkiewicz, *How Copyleft Uses License Rights*, *supra* note 19, at 185-94 (explaining the importance of licensing to open source software).

<sup>21</sup> See Gomulkiewicz & Williamson, *Brief Defense of Mass Market License Agreements*, *supra* note 2, at 346-52.

<sup>22</sup> Many hoped that the Uniform Computer Information Transactions Act would resolve the objections, but this did not happen. See Nim Razook, *The Politics and Promise of UCITA*, 36 CREIGHTON L. REV. 643 (2003).

<sup>23</sup> See generally David A. Einhorn, *Box-Top Licenses and the Battle-of-the-Forms*, 5 SOFTWARE L.J. 401 (1992); Richard H. Stern, *Shrink-Wrap Licenses of Mass Marketed Software: Enforceable Contracts or Whistling in the Dark?*, 11 RUTGERS COMPUTER & TECH. L.J. 51 (1985); Michael G. Ryan, Note, *Offers Users Can't Refuse: Shrink-Wrap License Agreements as Enforceable Adhesion Contracts*, 10 CARDOZO L. REV. 2105 (1989).

<sup>24</sup> E.g., Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319 (1999).

<sup>25</sup> E.g., J. Thomas Warlick, IV, *A Wolf in Sheep's Clothing? Information Licensing and De Facto Copyright Legislation*, 45 J. COPYRIGHT SOC'Y U.S.A. 158 (1997).

<sup>26</sup> E.g., Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511 (1997); Robert P. Merges, *Intellectual Property and the Costs of Commercial Exchange: A Review Essay*, 93 MICH. L. REV. 1570 (1995); Maureen A. O'Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479 (1995).

<sup>27</sup> See *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1113 (9th Cir. 1998); *1-A Equip. Co. v. I-Code, Inc.*, 43 U.C.C. Rep. Serv. 2d 807 (Mass. Dist. Ct. 2000).

<sup>28</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) began the trend, followed soon by *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (The *Hill* case, however, is about computer hardware, not software). Other cases followed. See, e.g., *Bowers v. Baystate Techs. Inc.*, 320 F.3d 1317 (Fed. Cir. 2003), *cert. denied*, 539 U.S. 938 (2003); *Specht v. Netscape Communications Corp.*, 306

other standard form contract cases: terms are construed against the drafter,<sup>29</sup> unconscionable terms are not enforced,<sup>30</sup> specifically negotiated terms win out over terms in the form,<sup>31</sup> and the user is not excused merely because he or she chose not to read the contract.<sup>32</sup> This leads to the inevitable conclusion that, despite the large volume of scholarly criticism, EULAs are here to stay for the foreseeable future.

## II. CREATING EULAS IN THE REAL WORLD<sup>33</sup>

Businesspeople in the software publishing industry understand the value that mass market licensing provides, but typically they view the license-creating process as a task in which they play a peripheral role.<sup>34</sup> They believe that creating a EULA is the lawyer's domain. At most, their role is

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F.3d 17 (2d Cir. 2002) (approving some mass market license transactions and not others); *Adobe Sys., Inc. v. Stargate Software, Inc.*, 216 F. Supp. 2d 1051 (N.D. Cal. 2002); *I.Lan Sys. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002); *Storm Impact, Inc. v. Software of the Month Club*, 13 F. Supp. 2d 782 (N.D. Ill. 1998); *Hotmail Corp. v. Van\$ Money Pie, Inc.*, 47 U.S.P.Q.2d 1020 (N.D. Cal. 1998) (court assumes enforceability of mass market license); *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993) (holding a mass market license enforceable in the initial transaction between a value added reseller and a software publisher, but unenforceable in a subsequent transaction); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305 (Wash. 2000); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (mixed computer hardware and software transaction).

<sup>29</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981); FARNSWORTH, *supra* note 13, at § 4.24. In the context of intellectual property licenses, compare *S.O.S, Inc. v. Payday, Inc.*, 886 F.2d 1081 (9th Cir. 1989) with *Bourne v. Walt Disney Co.*, 68 F.3d 621 (2d Cir. 1995); Uniform Computer Information Transactions Act § 307(f) (1999) [hereinafter U.C.I.T.A.].

<sup>30</sup> *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (1998). See also RESTATEMENT (SECOND) OF CONTRACTS § 211; U.C.C. § 2-302 (2001).

<sup>31</sup> See *Morgan Lab., Inc., v. Micro Data Base Sys., Inc.*, 41 U.S.P.Q. 2d 1850 (N.D. Cal. 1997); Uniform Computer Information Transactions Act § 209(a)(1) (1999).

<sup>32</sup> See *Groff v. America Online, Inc.*, No. PC 97-0331, 1998 WL 307001, at \*5 (R.I. Super. Ct. 1998).

<sup>33</sup> The accounts in this section are based on the composite of my experience working as inside and outside counsel for large, medium, and small software publishers. I spent ten years as a licensing lawyer at Microsoft and five years at Preston, Gates & Ellis in Seattle, Washington. I also chaired the U.C.I.T.A. Working Group of the Business Software Alliance during the U.C.I.T.A. drafting process (BSA members include Adobe, Apple, Autodesk, and Novell).

<sup>34</sup> The "hackers" of the open source community may be an exception to this general rule. Hacker notables often discuss licensing. See Brian Behlendorf, *Open Source as a Business Strategy*, in OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION 149, 164-69 (1st ed. 1999); Jim Hamerly & Tom Paquin, *Freeing the Source: The Story of Mozilla*, in OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION 197, 200-03 (1st ed. 1999); Bruce Perens, *The Open Source Definition*, in OPEN SOURCES: VOICES FROM THE OPEN SOURCE REVOLUTION 171 (1st ed. 1999).

to review a draft and sign off on the final document. As the release date for a software product approaches, they busy themselves with final preparations for the product launch: fixing bugs,<sup>35</sup> honing the marketing message, and signing up strategic partners.

The businessperson most interested in the EULA is often someone in the operations group. That person is not concerned with the EULA's content, only its form and finality. He or she has two persistent questions: "Is it done? Will it fit in the allotted space?"

The lawyers, especially in-house counsel, have many issues pressing on them as the product launch date nears. They might be clearing a last minute trademark conflict or settling a patent dispute. They might be reviewing advertising materials, drafting and negotiating strategic alliance contracts, and maybe even signing up a celebrity spokesperson. The EULA is one of many emergency projects that the lawyer faces and in the tyranny of the urgent, it often falls far down the "to do" list.<sup>36</sup>

Under pressure to get the EULA drafted quickly at the last minute,<sup>37</sup> the lawyer uses a pre-existing EULA as a starting point, making the minimum necessary changes. The more the lawyer lingers over the revisions, the shriller the businesspeople get—"is it done yet?" they demand. "How could a short document full of boilerplate take so long to draft?" they wonder.

Under these real world circumstances, the EULA stands little chance of being eloquent, stylish, or even particularly readable.<sup>38</sup> No one systematically re-thinks the business-deal points that are reflected in the words of the EULA, especially the boilerplate at the end of the document. Some say that that is just fine with software publishers, maybe even their goal—that they are intent on obfuscation not clarity. However, in my experience,

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<sup>35</sup> See CEM KANER & DAVID L. PELS, *BAD SOFTWARE: WHAT TO DO WHEN SOFTWARE FAILS* (1998); G. PASCAL ZACHARY, *SHOW-STOPPER!: THE BREAKNECK RACE TO CREATE WINDOWS NT AND THE NEXT GENERATION AT MICROSOFT* (1994) (describing the bugs encountered in the last minute rush to ship Windows NT); Eric S. Raymond, *How to Become a Hacker*, at [http://www.zvon.org/ZvonHTML/Translations/hacker/chapter5\\_en.html](http://www.zvon.org/ZvonHTML/Translations/hacker/chapter5_en.html) ("In this imperfect world, we will inevitably spend most of our software development time in the debugging phase.")

<sup>36</sup> Normally, no senior vice president is asking "Where's the EULA?" The V.P. only wants to know "Have we signed the deal with IBM yet?!"

<sup>37</sup> "When creativity is under the gun, it usually ends up getting killed. Although time pressure may drive people to work more and get more done, and may even make them feel more creative, it actually causes them, in general, to think less creatively." Teresa M. Amabile et al., *Creativity Under the Gun*, *HARV. BUS. REV.* 52-54, 57 (Aug. 2002).

<sup>38</sup> See Peter Wayner, *FREE FOR ALL 94* (Harper Business 2000) (reporting that an important open source license, the BSD-style license, was essentially a last minute "cut and paste" job from a University of Toronto license).

software businesspeople and their legal counsel seldom cynically connive to create an impenetrable EULA. It just happens naturally.<sup>39</sup>

End-users, of course, only see the net result—a wordy license, written in legalese, crammed onto a small piece of paper<sup>40</sup> or displayed electronically<sup>41</sup> with little thought given to its presentation. A curious user may read a bit of it. He or she may quickly skim the document for onerous terms. On rare occasions the user will ask a lawyer to help interpret the license. Usually, however, the user does not read the license at all.

### III. SHARED INTEREST IN USER-FRIENDLY LICENSES

#### A. *Users*

Software users could certainly benefit from more readable licenses. Well-informed consumers make better purchasing decisions, a principle that is fundamental to consumer protection law and policy.<sup>42</sup> In the case of software, the user not only acquires a collection of product features but also a set of license rights. In most software transactions the license *is* the prod-

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<sup>39</sup> It is fair to say that both commercial and non-commercial licensors have difficulty creating user-friendly licenses. The leading “open source” licenses are not easy to understand. *See* Robert W. Gomulkiewicz, *De-bugging Open Source Software Licensing*, 64 U. PITT. L. REV. 75 (2002) [hereinafter Gomulkiewicz, *De-bugging Open Source Software Licensing*]. Another good illustration is the form licenses provided by the Creative Commons project. The Creative Commons is a public interest organization whose mission is to encourage artists to dedicate their works to the public domain or to license them freely. The Creative Commons licenses are written in legalese. However, in an attempt to be user-friendly, Creative Commons has adopted various graphical symbols to signify certain grants of rights. Each Creative Commons license also comes with a summary of the license but the summary makes it clear that it is not legally binding—it calls the legalese the “legal code.” Though well-intentioned, innovative, and useful, these techniques reinforce the notion that licenses are for lawyers, not the average users, and that licenses with legalese are inevitable.

<sup>40</sup> Software companies are not the only ones trying to fit a lot of information into a small space—the “legalese” at the end of radio advertisements for loans or autos is read in rapid fire fashion, which is barely discernable.

<sup>41</sup> The fact that the EULA is in electronic form is not enough to defeat its enforceability. *See In re Real-Networks, Inc. Privacy Litigation*, No. 00-C1366, 2000 WL 631341 (N.D. Ill. May 8, 2000).

<sup>42</sup> Thomas L. Eovaldi, *The Market for Consumer Product Evaluations: An Analysis and a Proposal*, 79 NW. U. L. REV. 1235, 1237-39 (1985). *See also* Hans Rask Jensen, *Consumer Education as a Parameter of Consumer Action in Latin America and the Caribbean*, 14 J. CONSUMER POL’Y 207 (1991) (consumer education is important in most industrialized countries and some of the more advanced developing countries). Whether consumers actually take advantage of this information or use it to the best of their advantage is the subject of debate. *See id.*

uct—the software is capable of doing many things but the license describes what the user is entitled do.<sup>43</sup>

Software publishers sometimes compete on the scope of license rights granted, and it benefits consumers to understand the different packages of rights being offered.<sup>44</sup> Two examples provide good illustrations. In the early 1980s, WordPerfect for DOS was the best selling word processor for PCs. Microsoft hoped that it could top WordPerfect with a graphical user interface-based word processor for the Windows platform. Part of Microsoft's strategy was to compete on license terms: it expanded its license grant for Word to allow business users to put a copy of Word on their home or laptop computer, as well as on their desktop computer at work.<sup>45</sup>

Microsoft also used license terms to compete against Novell Netware, which was the dominant personal computer networking software product in the 1980s. Novell's licensing required a high upfront payment for the client computers which would be using the services of Netware server software.<sup>46</sup> Microsoft's licensing for Windows NT Server, by contrast, allowed users to add client licenses on an "as needed" basis, resulting in lower up-front costs and more flexible purchasing decisions.<sup>47</sup>

Apart from the license rights granted in a EULA, software companies sometimes compete on other contractual terms, such as warranties and product support.<sup>48</sup> For example, while some software companies offer no warranties, others promise that their products will work as described in the product documentation. Publishers of tax preparation software often promise to pay any penalties levied by the IRS due to software errors.<sup>49</sup>

## B. *Software Publishers*

Better written EULAs have clear benefits for software users, but why should software publishers care? There are many reasons why they should.

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<sup>43</sup> See Gomulkiewicz, *The License Is the Product*, *supra* note 2, at 896.

<sup>44</sup> *Id.* at 909-930 (appendix of representative license grants).

<sup>45</sup> See Carol Hildebrand, *Rigid Licensing Draws WordPerfect Users' Ire*, *COMPUTERWORLD*, Aug. 5, 1991, at 29 (describing WordPerfect's licensing policy).

<sup>46</sup> Paul Krill, *Wifinet, Utility Reduces Netware License Requirements*, *INFOWORLD*, March 13, 1995, at 47.

<sup>47</sup> See David P. Chernicoff, *NT Client Licensing: Flexibility and Gotchas*, *PC WEEK*, May 15, 1995, at N18.

<sup>48</sup> See Paul Andrews, *Some Support for Those That Offer Support*, *SEATTLE TIMES*, Dec. 8, 2003, at E1.

<sup>49</sup> See EULA for TurboTax.

First, software publishers should want users to understand the parameters of the license. The publisher cannot, realistically, expect a user to comply with its grant of rights if the user does not understand the grant.<sup>50</sup>

Second, if the publisher is offering a warranty, then it has every reason to get that information in front of the customer. If it is not offering one, it is better for the customer to know this up front rather than to have scores of surprised, angry customers calling on the phone or sending flame mail. Early candor usually sits better with customers than belated surprise.

Third, well-crafted licenses build goodwill with customers. Publishers set a certain tone in their licenses.<sup>51</sup> The tone of EULAs run the gamut—sloppy or out of date-sounding EULAs communicate that the publisher does not take the license seriously; lengthy EULAs make the user suspicious that the publisher is hiding things in the fine print; relatively short, readable EULAs in a friendly tone using contemporary language make the user feel as if the EULA “matters.” A license can make a user feel as if he or she is dealing directly with the corporate legal department (a negative experience) or a businessperson who values their business (a more positive experience).

Fourth, the more accessible the EULA, the more willing a court will be to enforce it in case of a dispute. Developing goodwill with the customer also results in goodwill with the court. This makes sense, of course. In cases where the contract document is a standard form, the court wants to make sure the recipient of the adhesion contract was dealt with fairly.

#### IV. USER-FRIENDLY LICENSES

This section describes the features of a user-friendly license.<sup>52</sup> Then, it discusses the challenges involved in creating one.

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<sup>50</sup> In the mass market, licenses are usually “enforced” by the good will of the end user, not by litigation. The cost of enforcing contracts in a court of law with multiple individuals would be prohibitive in most cases. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 43 (2003).

<sup>51</sup> The tone of the GNU General Public License, a leading open source license, attracts some software developers and repulses others. See Gomulkiewicz, *De-bugging Open Source Software Licensing*, *supra* note 39. Microsoft’s research division attempted to attract developers to its “Virtual Worlds” platform with a friendly license which would appeal to academics and hobbyists.

<sup>52</sup> See generally DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* (1963); RUDOLF FLESCH, *HOW TO WRITE PLAIN ENGLISH: A BOOK FOR LAWYERS AND CONSUMERS* (1979); DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE* (1982).

### A. *Features*

A user-friendly license should have the following attributes:

- \* Be written in plain, simple language;
- \* Be presented in a “friendly” format;
- \* Be as brief as possible;
- \* Explain concepts clearly and in sufficient detail;
- \* Contain a simple licensing model;
- \* Contain terms that benefit the user.

### B. *Plain, Simple Language*

EULAs would be more friendly if their authors used plain, simple language.<sup>53</sup> Lawyers write most EULAs using a technical legal writing style. This style has some advantages.<sup>54</sup> It is precise. It uses nomenclature that is meaningful to lawyers and judges who might interpret the license. However, this style of writing is not very accessible to the average software user. In fact, it communicates to the user that the audience for the EULA is lawyers, not average users.<sup>55</sup>

### C. *“Friendly” Format*

EULAs would be more accessible if they were presented in a user-friendly format.<sup>56</sup> Unfortunately, many EULAs come on a small paper card, on product packaging, or in a user manual. The EULA is printed in black and white using 10-point type or less. There is very little white space in and around the EULA, making the text very dense. Many EULAs today are presented in electronic form. These EULAs tend to look a lot like the paper version (or worse).

The unfriendly format of the EULA strongly suggests that the format was not chosen with readability in mind. Indeed, economy tends to be the driving force. Short documents keep the cost of goods sold low: a one page

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<sup>53</sup> See generally FLESCH, *supra* note 52.

<sup>54</sup> See generally ALFRED PHILLIPS, *LAWYERS’ LANGUAGE: HOW AND WHY LEGAL LANGUAGE IS DIFFERENT* (2003).

<sup>55</sup> See generally Scott J. Burnham, *How to Read a Contract*, 45 ARIZ. L. REV. 133 (2002).

<sup>56</sup> “E-consumers who try to read electronic boilerplate must struggle to understand pages of legalese filled with jargon that would be difficult for an experienced attorney to decipher. Exacerbating the problem, reading from a computer screen is harder on the eyes than reading a paper form, and few users are likely to take time to print an electronic contract.” Hillman & Rachlinski, *supra* note 4, at 478.

EULA costs less to produce than a multi-page document, black and white copy costs less than color.

#### D. *Brevity*

Users seldom read long contract documents of any kind, and EULAs are no exception. If EULAs were shorter, then it is more likely that users would read them. There is another advantage to short EULAs: brevity tends to encourage authors to economize on language which, in turn, often leads to clearer writing.<sup>57</sup>

#### E. *Clear Explanations*

EULAs often relate to complicated technology or business arrangements. In this context, the bare words of the license, no matter how well written, can fail to communicate the message effectively. Illustrations, examples, and elaborations in the EULA can shed crucial light on these complicated subjects.

#### F. *Simple License Model*

It is easier to explain a simple licensing model than a complex one. The more nuanced the license grant or the more conditions the software publisher places on use of the software, the more complex the license becomes.

#### G. *Customer-Friendly Terms*

The software publisher's choice of substantive contract terms affects the EULA's complexity. For example, it takes fewer words to give all implied warranties than to disclaim them;<sup>58</sup> to assume full liability for dam-

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<sup>57</sup> See MELLINKOFF, *supra* note 52 (arguing for precision and brevity).

<sup>58</sup> It is not clear whether implied warranties apply to software licenses. Implied warranties, though drawn from common law concepts, come from Uniform Commercial Code, Article 2. Robert W. Gomulkiewicz, *The Implied Warranty of Merchantability in Software Contracts: A Warranty No One Dares to Give and How to Change That*, 16 J. MARSHALL J. COMPUTER & INFO. L. 393 (1997) [hereinafter Gomulkiewicz, *The Implied Warranty of Merchantability in Software Contracts*]. Some courts apply Article 2 to software transactions but some do not, and commentators take both sides of the issue. See *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002); Lorin Brennan, *Why Article 2 Cannot Apply to Software Transactions*, 38 DUQ. L. REV. 459 (2000); Robert B. Mitchell, *Software*

ages than to limit liability; to remain silent on choice of law or venue than to choose it; to permit reverse engineering<sup>59</sup> than to prohibit it;<sup>60</sup> to allow publication of benchmark results than to ban publication; to allow free transfer of software than to limit it.

## V. CHALLENGES

User-friendly licenses should be easy to create. What stands in the way? This section discusses some of the challenges.

### A. *License Models Getting More Complex*

The licensing model for many software products is simple: you can use the product in any way that it is capable of being used. For these products, the license grant, at most, needs to say that the user may use the software as described in the product documentation.<sup>61</sup> For many software products, however, the licensing model is more complex. Microsoft's licensing model for Windows NT Server provides a good example of how a customer-friendly licensing model can lead to EULA complexity.

The Windows NT Server product came with client and server software, so the EULA addressed the licenses for both. In the case of the client software, Microsoft allowed users to freely copy the software onto any client computer that would, at some point, connect to the server software. In the case of the server software, Microsoft allowed the customer to make

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*and Data Transactions Under Article 2 of the U.C.C.*, DATA LAW REP., Sept. 1995, at 14, 25-26. In the face of this uncertainty, most software publishers take the conservative approach and write their EULAs as if Article 2 applies. Consequently, most EULAs contain language either disclaiming or modifying Article 2's implied warranties of "merchantability" and "fitness for a particular purpose." In states that have adopted the Uniform Computer Information Transactions Act (Virginia and Maryland, at this juncture), a software transaction comes with implied warranties of merchantability of a computer program, systems integration, and informational content, and a gap-filler warranty of non-infringement. See U.C.I.T.A. §§ 401-405 (1999).

<sup>59</sup> Under U.S. law, reverse engineering is generally permissible unless a contract prohibits it. See *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1338 (Fed. Cir. 2003).

<sup>60</sup> See generally Andrew Johnson-Laird, *Software Reverse Engineering in the Real World*, 19 U. DAYTON L. REV. 843 (1994); Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575 (2002).

<sup>61</sup> The right to use the software is not always as straightforward as it might be. The GNU General Public License clouds the issue unnecessarily. See Gomulkiewicz, *Debugging Open Source Software Licensing*, *supra* note 39. See also *Nat'l Car Rental Sys. Ins. v. Computer Assoc. Int'l*, 991 F.2d 426, 431-32 (8th Cir. 1993).

copies for a relatively low per-copy fee. Microsoft also required a license, called a Client Access License (“CAL”), for any client software to use the services provided by the server software. This licensing model allowed the customer to get its system up and running for a relatively modest cost, and then pay incrementally for CALs as the customer brought additional client computers online. Microsoft had created a customer-friendly licensing model, but describing that model in a EULA was challenging.

Several enhancements to the licensing model made things even more difficult for the EULA drafter. The businesspeople wanted to improve customer choice by allowing them to purchase CALs based on a variety of scenarios: the number of client computers using the server services (per client or per seat licensing), the number of individual users using server services (per person licensing), or the number of client computers simultaneously connected<sup>62</sup> to the server using server services (per server licensing).<sup>63</sup> To make matters more complex, the businesspeople wanted to permit customers to switch around between types of CALs.<sup>64</sup>

All of these features of the EULA were made in the interest of giving customers maximum choice.<sup>65</sup> The EULA terms gave Microsoft a significant competitive advantage vis-à-vis Novell Netware’s more expensive and less flexible licensing model. Yet, from the standpoint of creating a readable EULA, the license terms led to complexity rather than simplicity.

#### B. *Not Enough Participation by Non-Lawyers*

As mentioned previously, businesspeople in the software industry think that EULAs are in the legal department’s domain. They think that because a EULA is a contract document, lawyers should write it and only lawyers need to understand it in any detail. They often treat completion of the EULA as an item on a checklist for someone else to complete, with their only job being to create sufficient pressure on the lawyer to get the EULA completed on time.

This adversely affects license user-friendliness in several ways. First, there is little feedback on how the EULA reads from a customer point of view—no lay reader questions the lawyer’s legal, technical writing style. Second, the licensing model is not clearly articulated because the lawyer is

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<sup>62</sup> See Bert Latamore, *Software Vendors Move Toward Concurrent Licensing*, INFOWORLD, Nov. 30, 1992, at 50.

<sup>63</sup> See CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES 49-50 (1999).

<sup>64</sup> See David P. Chernicoff, *NT Client Licensing: Flexibility and Gotchas*, PC WEEK, May 15, 1995, at N18.

<sup>65</sup> See Fred M. Greguras & Sandy J. Wong, *Software Licensing Flexibility Complements the Digital Age*, 11 No. 12 COMPUTER LAW. 15, 15 (1994).

usually not as well-versed in the business model as the businessperson. Often, lack of clarity in the EULA is directly attributable to the lawyer's imperfect understanding of the licensing model, which is never corrected by a careful business-side reader. Third, when businesspeople do not actively participate in drafting the EULA they are not forced to think through the hard cases and gray areas that often surface as business concepts are translated into a written contract.

### C. *Not Enough Participation by Senior Managers*

The employee who "owns" the EULA on the business-side is usually a mid-level or low-level employee. Senior management sees the EULA as a relatively non-strategic, low revenue contract between the company and an individual user. However, this is an incorrect perception of the magnitude of the contract formed by the EULA. EULAs are, in the aggregate, a contract with a group of people rivaling the largest corporate end user in size, bringing in revenue in the thousands or millions of dollars. Most contracts of this magnitude would be read and approved by senior management, but the EULA is not. Consequently, the high level businessperson most responsible for the profitability of the software product never reviews or critiques the contract document that licenses it.

Lack of leadership by a senior management can lead to another impediment to improving EULAs: too much democracy. Often, multiple businesspeople have a stake in the EULA's contents. Someone on the product development team may want to grant broad rights and someone on the sales team may want to grant narrower rights (or vice versa).

If the product is a suite of software programs, then the product development teams for each program may have different and conflicting notions of what the EULA should provide. In this situation, the EULA expands to accommodate the various terms proscribed by each team since no one, other than perhaps the lawyer, has the authority to say "no" to more words. It is also difficult to get consensus about terms that might be friendlier for users, such as warranties or limitations of liability. Since no product team can force another to take the "risk" of providing additional rights to the user, the contractual term most protective of the software publisher's position usually ends up in the EULA.

### D. *License Friendliness is Not a Top Priority*

Creating user-friendly licenses has seldom been viewed as a top priority of software publishers. In a corporate setting, a subordinate takes his or

her cues from senior management. The relatively low ranking employee who has been assigned the thankless task of making sure a EULA is created or revised will not give readability a high priority if senior management does not clearly signal that it is a high priority. Thus, even if senior management sincerely desires to improve EULA readability, it will never happen if management fails to get involved in the process and hold the subordinate accountable for achieving a more readable EULA. If the EULA is not a top priority, then it will lose out to competing priorities time after time. In the rush to get a product out the door, it is easy for an overburdened employee to go along with tried and true legalese and opt for language that maximizes safety and revenue, even at the expense of easier to read prose, fewer words on the page, or more customer-friendly terms.

#### E. *Conflicting Objectives*

The objective of creating a more readable EULA can conflict with other compelling priorities. For instance, using a plain language writing style often means less precision and clarity in describing the licensing model. The increase in fuzziness can result in a decrease in revenue or increase in risk since all ambiguities will be resolved against the software publisher who drafted the EULA.

The aspiration to create a friendlier EULA may increase the cost of the product. The software publisher is trying to keep the price of its product as low as possible, so putting money into EULA readability creates a dilemma—is the increased cost worth it? Will the user, in effect, pay for the more readable EULA?

The features of a more readable license may be in tension with one another. For example, some people suggest that brief EULAs are synonymous with more understandable EULAs. In some cases that is true. But the goal of brevity often collides with the goal of explaining concepts with illustrations and elaborations. Brevity may mean that the EULA leaves gray areas gray.

#### VI. WHAT LAWYERS (AND THEIR CLIENTS) CAN DO TO IMPROVE EULAS

We have examined the ingredients of a user-friendly license and the challenges that stand in the way of creating one. This section describes what lawyers (and the software publishers who employ them) can do to improve the user-friendliness of EULAs. The scholarly debate about EULAs seldom, if ever, delves into this topic. That is unfortunate and misleading, however, because the scholarly debate should not just consider what

legislatures or courts might do to improve EULAs. Indeed, some of the most viable solutions to the problems with EULAs may not come from legislation or judicial action at all but from private action.<sup>66</sup>

#### A. *Developing a Process for Creating User-Friendly EULAs*

The creation of a user-friendly license requires serious commitment on the part of license drafters, lawyers and businesspeople alike. Aspiring to create this type of EULA is a good start, but in the real world the software publisher and its lawyers must consciously implement a process for getting the job done.

The keys to a successful process are:

- \* Make license friendliness a top priority (not merely a priority) of senior management;
- \* Appoint a senior manager to resolve disputed issues during the process and provide final review and approval;
- \* Form a core group that has the expertise and decision-making authority to accomplish the task;
- \* Hold those who undertake the task of creating a friendly EULA accountable for their results in employee reviews;<sup>67</sup>
- \* Draw on expertise and perspectives outside the core group when appropriate;
- \* Take advantage of state of the art techniques for effective presentation of information;
- \* Scrutinize every provision of the EULA.

#### B. *The Process in Action*

The process starts at the top: a decision by senior management that creating a user-friendly license is a top priority. The manager will delegate the drafting process to a subordinate—a EULA Product Manager (“EULA P.M.”). However, the senior manager does not completely step out of the process: he or she reviews the penultimate draft to determine whether, in

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<sup>66</sup> See Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1293-1296 (1996) (arguing that private collective rights organizations work more efficiently than government administered compulsory licensing) [hereinafter Merges, *Contracting into Liability Rules*].

<sup>67</sup> If the employee succeeds in the task he or she would be rewarded as appropriate. See Teresa Amabile, *How to Kill Creativity*, HARV. BUS. REV. 80 (Sept.-Oct. 1998) (describing what motivates employees to act creatively).

his or her opinion, the contract is satisfactory. The senior manager also remains available along the way to help resolve disputes over business trade-offs, such as whether to revise the EULA's approach to warranties, or whether the business model should be simplified even if it means less customer choice or leaving money on the table.<sup>68</sup>

Although the senior manager remains available to resolve selective issues when escalated by the EULA P.M., the P.M. holds significant decision-making authority. He or she is authorized to decide whether the value of a given EULA term is worth the complexity it adds. The P.M.'s decision will often come down to a choice between user-friendliness and maximizing revenue or limiting exposure to negative consequences, and the EULA P.M. is authorized to make the decision.

The EULA P.M. surrounds himself or herself with a small core group: a lawyer, someone from the product development team, someone from the customer sales team, someone from the marketing team, and someone from the operations team. This core group represents the perspectives and expertise of each stakeholder in the process.<sup>69</sup> Each core group member understands that creating a user-friendly EULA is a top priority of senior management and that he or she is accountable for achieving (or not achieving) that objective. Each member comes with decision-making authority on behalf of his or her constituency.

The EULA P.M., with input from the core group and others, identifies specific mileposts that will improve the EULA. For instance, the P.M. sets a goal of shortening the EULA by x% of words or reducing the word count down to x words. The P.M. decides that the EULA must fit on one piece of paper rather than two. The P.M. demands that the EULA be shorter than the EULA of a competitor.

The P.M. chooses one of several group processes to drive the overhaul of the EULA. The P.M. might take the core group off site on a retreat with the single objective<sup>70</sup> of simplifying the license. The group immerses itself in the task, working on the project until completion of a substantial rewrite. Alternatively, the P.M. could have the core team address simplification draft by draft, meeting at regularly scheduled intervals, with specific simplification objectives set for each succeeding draft. Finally, the P.M. could work with one or two simplification experts (such a lawyer who is particularly adept at plain language writing) to substantially revise the EULA, and then take the results back to the core group which would fine tune the EULA to create the final version.

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<sup>68</sup> See *id.* at 85.

<sup>69</sup> See *id.* at 82-83 ("If you want to build teams that come up with creative ideas, you must pay attention to the design of such teams.").

<sup>70</sup> Teresa M. Amabile et al., *Creativity Under the Gun*, HARV. BUS. REV. 59 (Aug. 2002).

As the core group spends a significant amount of time revising the EULA, the members will begin to lose the perspective of the average user. At this point, the EULA P.M. will circulate the EULA draft to other readers to gauge their reactions. The P.M. might subject the EULA to formal usability testing similar to the testing software companies use to evaluate the relative friendliness of user interface designs. The P.M. might consult graphic designers who can suggest improvements to the aesthetic presentation of the EULA. The designers might suggest use of color, typefaces, fonts, white space, and other devices to improve readability.

If the EULA will be presented electronically, the EULA P.M. will consider how to use the latest multimedia features of computers to present the EULA in a more engaging manner. Sound, video,<sup>71</sup> color, animation, rich text, and the ability to “go deeper” via HTML linking have improved computer usability dramatically—these techniques could have the same positive impact on EULAs. EULAs presented on the Internet can take advantage of the graphical capabilities of the World Wide Web and the power of hypertext linking. For example, key words in a EULA could link to more detailed explanations of EULA terms or a series of illustrations. Web format allows the EULA to be relatively brief, but puts elaborations easily within reach.

## VII. HOW TECHNOLOGY MIGHT ASSIST USERS

I have already described how the multimedia capabilities of software can be tapped to improve the friendliness of EULAs. Other technology might be useful as well. Robots known as “shopbots” find products with defined features and prices by scouring the Web; shotbots can also act as the shopper’s electronic agent to purchase a product.<sup>72</sup> For example, a shopbot might search the Web for sites selling six-string Taylor guitars with a dreadnaught shape and rosewood back for less than two thousand dollars.<sup>73</sup>

In the same manner, a shopbot might search for EULAs with certain desirable license terms. To make this process work, a technology called

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<sup>71</sup> Software publishers could take a cue from the airlines which present safety information in both written form and via either a live performance or a video. Even road warriors find themselves watching the same demonstration of seat belt buckling that they have seen many times before.

<sup>72</sup> See generally Jeffrey M. Rosenfeld, *Spiders and Crawlers and Bots, Oh My: The Economic Efficiency and Public Policy of Online Contracts that Restrict Data Collection*, 2002 STAN. TECH. L. REV. 3, 53 (2002).

<sup>73</sup> Websites known as “metasites” might also be useful. See Linda Knapp, *Shopping Sites Track Best Prices, Merchants*, SEATTLE TIMES, November 15, 2003, at C6.

eXtensible Markup Language (“XML”)<sup>74</sup> would be applied to the EULA to make it easier for the bot to find the terms.<sup>75</sup> XML is an information management tool that marks or tags data for easy identification and retrieval.<sup>76</sup> A standards organization known as “Legal XML” is considering ways to use XML technology with legal documents including contracts. This organization aims to define the tags that would apply to contracts.

A simple example demonstrates how marking a EULA with XML could be useful. Assume that a certain XML tag identifies the warranty and another tag identifies the license grant. The tagging tells the bot (and the bot’s principal) that the EULA contains these two contract provisions. This information is only marginally helpful. However, if one tag signifies “no warranty” and another tag signifies “full warranty,” the bot could search for EULAs with the “full warranty” tag if that is what the user desires. Similarly, if one tag signifies “free software” license<sup>77</sup> and another tag signifies “BSD-style” license,<sup>78</sup> a user could search accordingly.

XML-reading bots hold promise<sup>79</sup> but are years away from mainstream usage.<sup>80</sup> XML authoring tools are just beginning to reach the market.<sup>81</sup> More importantly, lawyers are only in the preliminary stages of applying XML to contracts<sup>82</sup> and the process is complex.<sup>83</sup>

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<sup>74</sup> STEVEN HOLZNER, *REAL WORLD XML* (2003); SIMON ST. LAURENT, *XML, A PRIMER* (3d ed. 2001).

<sup>75</sup> See Winchel “Todd” Vincent, III, *Legal XML and Standards for the Legal Industry*, 53 SMU L. REV. 1395 (2000); Jane K. Winn, *Making XML Pay: Revising Existing Electronic Payment Law to Accommodate Innovation*, 53 SMU L. REV. 1477, 1494 (2000) (observing that the combination of electronic agent software and XML has the power to improve consumer transactions).

<sup>76</sup> See Douglas E. Phillips, *XML Schemas and Computer Language Copyright: Filling in the Blanks in Blank Esperanto*, 9 J. INTELL. PROP. L. 63 (2001).

<sup>77</sup> See Richard Stallman, *The GNU Operating System and the Free Software Movement*, in *OPENSOURCES* 53 (Chris DiBona et al. eds. 1990); Free Software Foundation, *Why “Free Software” is better than “Open Source,”* at <http://www.gnu.org/philosophy> (last visited Jan. 15, 2004).

<sup>78</sup> See Gomulkiewicz, *De-bugging Open Source Software Licensing*, *supra* note 39 (describing both “free software” and BSD-style licenses); Wayner, *supra* note 38, at 77-103 (describing evolution of BSD license).

<sup>79</sup> See Tim Berners-Lee, *The Semantic Web: A New Form of Web Content that is Meaningful to Computers will Unleash a Revolution of New Possibilities*, *SCI. AM.*, May 1, 2001, at 34, 36.

<sup>80</sup> See David Becker, *Taking XML’s Measure*, at <http://news.com.com/2008-1082-5080774.html> (Sept. 23, 2003); Peter Lucas, *Pumped Up: Business Reaches for the promise of XML*, *ELECT. COM. WORLD*, Apr. 2001, at 25.

<sup>81</sup> Adobe and Microsoft are reportedly including XML tools in the next version of their respective authoring products. See David Becker, *Adobe Buys XML Software Maker*, at [http://msnnet.com.com/2100-1012\\_3-5104919.html](http://msnnet.com.com/2100-1012_3-5104919.html) (last modified Nov. 10, 2003).

<sup>82</sup> See [www.legalxml.org](http://www.legalxml.org).

<sup>83</sup> In addition to complexity, the process raises important issues about control of the Web. See generally Edward L. Rubin, *Computer Languages as Networks and Power Structures: Governing the Development of XML*, 53 SMU L. REV. 1447 (2000).

For instance, using the example above, how do you define a contract clause that actually provides “no” warranties? Does that mean no express warranties in the contract and an attempt to disclaim implied warranties?<sup>84</sup> What if the disclaimer of implied warranties is ineffective because state law does not permit such disclaimers—in which case the license may say it is not providing any warranties but some may be implied in law—is that a “no warranty” situation?<sup>85</sup> And what qualifies as a full warranty? Does this include a warranty that the software is free of defects?<sup>86</sup> Does it include a warranty of clean title?<sup>87</sup> How about a warranty of non-infringement for all types of intellectual property?<sup>88</sup>

Moreover, although shopbot and XML technology may help users find desirable EULAs, that is only a small part of the story.<sup>89</sup> The information that a shopbot encounters is useful only if the human principal knows what he or she is looking for and why it is important. XML-reading shopbots are only useful to a well-educated user. User education about EULAs necessarily comes before the age of “EULAbots.”

#### VIII. WHAT LAW SCHOOLS CAN DO TO IMPROVE THE FRIENDLINESS OF EULAS

Law schools could play an important role in improving the friendliness of EULAs by teaching law students how to draft user-friendly licenses. Law schools teach legal writing in a variety of ways. Some law schools simply rely on case reading to “teach” writing, supplemented by exam writing, research papers, and for a select few, law review work. Many law schools have specialized legal writing programs. These programs tend to focus on practice-oriented writings, primarily research memoranda and appellate briefs. It is probably fair to say that the most under-taught type of legal writing is contract drafting.<sup>90</sup> Even if a law school does offer a course

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<sup>84</sup> See U.C.I.T.A. § 406 (1999).

<sup>85</sup> It is just as difficult to define when a license grant qualifies as a “copyleft” or “BSD-style” license.

<sup>86</sup> See U.C.I.T.A. § 403 (1999). See also Gomulkiewicz, *The Implied Warranty of Merchantability in Software Contracts*, *supra* note 58; Jeffery C. Selman & Christopher S. Chen, *Steering the Titanic Clear of the Iceberg: Saving the Sale of Software from the Perils of Warranties*, 31 U.S.F. L. REV. 531 (1997).

<sup>87</sup> See U.C.I.T.A. § 401 (1999).

<sup>88</sup> See Gomulkiewicz, *The License Is the Product*, *supra* note 2, at 905-06.

<sup>89</sup> An additional issue that may bear on adoption of Legal XML is its copyrightability. See Trotter Hardy, *The Copyrightability of New Works of Authorship: “XML Schemas” as an Example*, 38 HOUS. L. REV. 855 (2001); Phillips, *supra* note 76.

<sup>90</sup> See Charles M. Fox, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN’T TEACH YOU (2002).

in contract drafting, however, it likely does not teach students how to draft licenses.<sup>91</sup>

It would be unfair to criticize law schools too harshly for failing to teach license drafting. It has been only in the past decade that licensing has emerged as a discrete and important practice area. Today, licensing is a core part of both intellectual property and general commercial practice.

There is a trend in law school education that could accelerate the addition of license drafting to the curriculum. Over the past few years many law schools have added intellectual property-related LL.M. programs, certificates, or concentration tracks.<sup>92</sup> License drafting should be a core offering in these programs.

Courses on license drafting can serve as a catalyst to get students thinking about and practicing the skill of creating user-friendly licenses. Licenses are a unique brand of contract: the contract law governing a license may come from U.C.C. Article 2, the common law of contracts, the Uniform Computer Information Transactions Act,<sup>93</sup> international treaties, foreign law, provisions within the intellectual property laws,<sup>94</sup> or all of the above.<sup>95</sup> There is an intimate relationship between contract law and intellectual property law.<sup>96</sup> Other laws put boundaries around licenses such as anti-trust law and the E.C. Directive on reverse engineering.<sup>97</sup>

The best licensing lawyers are the ones well-versed in these and other principles of licensing law. Deep knowledge of licensing law allows a lawyer to make intelligent decisions about when a EULA can remain silent on

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<sup>91</sup> The only student textbook on licensing law is a traditional casebook and does not focus on drafting. See KENNETH L. PORT, ET AL., LICENSING INTELLECTUAL PROPERTY IN THE DIGITAL AGE (1999).

<sup>92</sup> For many years, intellectual property-related LL.M. degrees have been offered at Franklin Pierce School of Law, John Marshall School of Law, and George Washington National Law Center. In the past few years, many other schools have followed suit, including Boston University School of Law, George Mason University School of Law, University of Houston Law Center, Illinois Institute of Technology Chicago-Kent College of Law, Indiana University School of Law (Indianapolis), University of Pennsylvania Law School, Stanford Law School (degree in Law, Science, and Technology), University of Texas School of Law (Austin), University of Washington School of Law, Washington University School of Law (St. Louis), Santa Clara University School of Law, University of San Diego School of Law, University of San Francisco School of Law, and Yeshiva University Cardozo School of Law. In addition, many law schools offer intellectual property-related certificates and concentration tracks.

<sup>93</sup> See [http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm).

<sup>94</sup> See generally RAYMOND T. NIMMER, LAW OF COMPUTER TECHNOLOGY: RIGHTS, LICENSES, LIABILITIES (1994).

<sup>95</sup> See Gomulkiewicz, *The License Is the Product*, *supra* note 2, at 892 (discussing warranty of non-infringement).

<sup>96</sup> See Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827 (1998).

<sup>97</sup> Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs, art. 6, 1991 O.J. (L 122) 42.

a particular issue, saving precious words. It allows a lawyer to abandon safe, formulaic language, freeing the lawyer to draft in plain language.

To improve licenses, lawyers need to learn two additional things. First, lawyers must learn how to write in plain language.<sup>98</sup> Fortunately, many law schools teach this style of writing. Second, lawyers must learn the purpose of each component of a license, which will allow the lawyer to be more creative in his or her approach to drafting.

## IX. WHAT THE LAW CAN DO TO IMPROVE THE FRIENDLINESS OF EULAS

### A. *Legislating User-Friendliness*

EULAs are not the first legal document to be criticized for their lack of user-friendliness. In the 1970s, legislatures in the United States and abroad began passing legislation requiring<sup>99</sup> sellers to use “plain language” in a variety of contracts and other legal documents. State legislatures first applied the so-called “plain language doctrine” to insurance contracts, but soon extended the reach of their legislation to other consumer contracts.<sup>100</sup>

The federal government passed laws in the 1970s mandating the use of “plain English” in documents used in consumer transactions, such as written warranties,<sup>101</sup> bank account terms,<sup>102</sup> and retirement plans.<sup>103</sup> In 1978, President Carter signed an executive order declaring that all federal regulations “shall be as simple and clear as possible.”<sup>104</sup> In 1993 the Securities and Exchange Commission began an effort to apply the plain language doc-

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<sup>98</sup> BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES* (2001); MARK E. WOJCIK, *INTRODUCTION TO LEGAL ENGLISH: AN INTRODUCTION TO LEGAL TERMINOLOGY, REASONING, AND WRITING IN PLAIN ENGLISH* (1998); RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (4th ed. 1998).

<sup>99</sup> The plain language disclosure movement began voluntarily in the private sector where lenders re-wrote their promissory notes into plain language. See Andrew T. Serafin, Comment, *Kicking the Legalese Habit: The SEC's "Plain English Disclosure" Proposal*, 29 *LOY. U. CHI. L.J.* 681, 692 (1998).

<sup>100</sup> See Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 *EMORY INT'L L. REV.* 1 (2002); David M. LaPrairie, Note, *Taking the "Plain Language" Movement Too Far: The Michigan Legislature's Unnecessary Application of the Plain Language Doctrine to Consumer Contracts*, 45 *WAYNE L. REV.* 1927 (2000).

<sup>101</sup> Magnuson-Moss Warranty Act, 15 U.S.C. § 2302(a) (1994).

<sup>102</sup> 15 U.S.C. § 1693b(b) (2000).

<sup>103</sup> 29 U.S.C. § 1022(a) (2000).

<sup>104</sup> Exec. Order No. 12,044, 43 Fed. Reg. 12661 (1978), revoked by Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 46 Fed. Reg. 13,193 (1981). President Regan revoked President Carter's Executive Order shortly after taking office. *Id.*

trine to federal investor law, particularly proxy statements and prospectuses<sup>105</sup> used for selling securities.

The plain language movement is not limited to the United States. European countries have been particularly active in passing plain language legislation to induce businesses to deploy readable contracts.<sup>106</sup> Most notable is a European Union Council Directive requiring that certain terms offered to consumers must be in “plain, intelligible language.”<sup>107</sup>

### B. *Applying the “Plain Language” Mandate*

Legislatures use a variety of approaches to determine whether a party has met its “plain language” mandate. Some legislation simply states that parties must use everyday language, and leaves application of the standard for courts based on the facts and circumstances of the particular transaction. At most, the legislation provides some general guidelines for courts to consider, such as the suggestion that they consider the nature of the parties involved in transaction.

Other legislation focuses on the complexity and length of words and sentences used in a contract or other legal document. Some legislation uses the Flesch Test, which provides a statistical formula for measuring readability.<sup>108</sup> Still other legislation relies primary on a “facts and circumstances” test, but provides a safe harbor for contracts that meet an objective measure of readability or which have been pre-approved by a governmental agency such as the SEC or State Attorney General.<sup>109</sup>

### C. *Should Legislatures Pass Laws Requiring Plain Language in EULAs?*

Some broadly sweeping state plain language laws may already apply to EULAs. Where they do not, however, and in jurisdictions that do not have plain language laws, should legislatures pass such laws to induce

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<sup>105</sup> See Michael G. Byers, *Eschew Obfuscation—the Merits of the SEC’s Plain English Doctrine*, 31 U. MEM. L. REV. 135 (2000); Serafin, *supra* note 99.

<sup>106</sup> See Bates, *supra* note 100, at 43-90 (describing legislation in the United Kingdom, Germany, Sweden, and Israel).

<sup>107</sup> Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, art. 4, 1993 O.J. (L 95) 29. “In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.” *Id.* at art. 5.

<sup>108</sup> See Serafin, *supra* note 99, at 683-86.

<sup>109</sup> See LaPrairie, *supra* note 100, at 1933.

software publishers to deploy user-friendly EULAs? The answer is a definite “maybe.”

The goal of “plain language” legislation is noble.<sup>110</sup> The difficult question is how well such legislation works and whether it is worth the cost to businesses and taxpayers that it imposes. Below, I discuss these issues.

### 1. Does Legislation Improve Readability?

The most basic question to consider is whether legislation induces businesses to create more readable contracts. Anecdotal evidence suggests that the SEC plain language project has led to more readable documents. An Opinion released by the EU Economic and Social Committee on the effectiveness of the EU Directive seems to indicate that the results in the EU have been mixed.<sup>111</sup>

Some approaches work better than others. Those jurisdictions that rely primarily on so-called objective tests of readability, such as the Flesch Test, fall prey to the many well-documented weaknesses of such tests. For example, the Flesch Test is unable to recognize distinctions in grammar<sup>112</sup> or word order.<sup>113</sup> The Flesch Test limits its evaluation to the number of words, sentences, and syllables in the contract but cannot evaluate the overall effectiveness of communication. In other words, the Flesch test penalizes illustrations, elaborations, and clarifying words. This deficiency is referred to as the “clarity is verbal brevity” fallacy.<sup>114</sup>

Other plain language measures simply leave matters to the judgment of the courts. This approach leaves contract drafters with considerable uncertainty about whether they are in compliance, and consumers unsure about whether they will be successful in challenging contractual language.

There are other approaches as well. The SEC publishes a practical guide entitled “A Plain English Handbook: How to Create Clear SEC Disclosure Documents.”<sup>115</sup> This guide, as the title suggests, describes the SEC’s view on what it takes to create acceptable documents. The Economic

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<sup>110</sup> Some commentators argue that the law cannot be written plainly and simply, and that this notion needs to be eradicated. See ALFRED PHILLIPS, *LAWYER’S LANGUAGE: HOW AND WHY LEGAL LANGUAGE IS DIFFERENT* (2003).

<sup>111</sup> See Opinion of the Economic and Social Committee on the “Report from the Commission on the implementation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts,” art. 7.1, 2001 O.J. (C 116) 117[hereinafter Committee Opinion].

<sup>112</sup> “I went to the store” versus “I goed to the store.”

<sup>113</sup> “I went to the store” versus “Went I to the store.”

<sup>114</sup> See Harold A. Lloyd, *Plain Language Statutes: Plain Good Sense or Plain Nonsense?*, 78 L. LIBR. J. 683, 690-91 (1986). See also discussion on Conflicting Objectives, *supra* Part V.E.

<sup>115</sup> 17 C.F.R. § 230.421 (1997).

and Social Committee of the European Commission recommended the creation of “black list” contract terms (terms that are automatically void) and “grey list” contract terms (terms to receive special scrutiny by administrative authorities).<sup>116</sup>

These guides to friendly contracts are often supplemented by some form of administrative interaction. In some cases, a business can submit a form contract or other document to an administrative agency for review. If the agency finds that the form is acceptable, the form is either deemed to be in compliance,<sup>117</sup> receives a presumption of validity in case it is challenged, or some other positive treatment.<sup>118</sup>

## 2. Does the Benefit Outweigh the Cost?

Each approach to plain language legislation comes with costs as well as benefits. Below, I discuss some the trade-offs.

### a. *The “just do it” approach*

The primary benefit of legislation that simply tells businesses to use plain language in standard forms is that it does not create much additional cost for administrative agencies. It puts the cost of enforcement on the courts and, primarily, on the litigating parties. This “benefit,” of course, creates a significant burden for the consumer, and some argue that this cost negates the benefit of the legislation.<sup>119</sup> However, others point out that simply focusing the efforts of businesses on creating plain language contracts may be a significant positive benefit of plain language legislation in and of itself (i.e., that voluntary compliance alone results in material benefits).<sup>120</sup>

### b. *The “objective measure” approach*

The primary benefit of legislation that relies on objective measures such as the Flesch Test is that it creates certainty about when a contract does or does not meet the legislative standard. Unfortunately, as discussed

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<sup>116</sup> See Committee Opinion, *supra* note 111, at 10.6.

<sup>117</sup> *Id.* at 8.2.2.

<sup>118</sup> Prospectuses not in plain English will not receive accelerated review by the SEC. 17 C.F.R. § 230.461 (1997).

<sup>119</sup> See Bates, *supra* note 100, at 6.

<sup>120</sup> See Albert J. Millus, *Plain Language Laws: Are They Working?*, 16 UCC L.J. 147, 151-52 (1983).

in Part IX.C.1, these objective tests do not necessarily lead to more readable documents and sometimes create incentives to say less when more would have been better.<sup>121</sup> Some commentators have expressed concern that the burden of complying with the legislation will fall more heavily on small businesses, and this may be particularly true in the software industry where licensors come in all shapes and sizes and exist in large numbers.<sup>122</sup>

c. *The “incentive” approach*

Some legislation attempts to motivate businesses to write user-friendly contracts by providing incentives to do so. Some laws create a presumption of validity for “plain language” terms or a safe harbor from claims of unfair business practices. In many ways this is a useful approach: businesses benefit from the certainty created by obtaining the blessing of an administrative agency; consumers benefit because contracts are reviewed with readability in mind.

However, intensive involvement by administrative agencies in reviewing draft EULAs would no doubt be very costly.<sup>123</sup> It would also create a high logistical hurdle for software publishers who often release software spontaneously and in high volume. Even if the software publisher could get a draft EULA to the agency in a timely manner, there is the problem of timely turnaround (the fewer government employees involved, the slower the turnaround).<sup>124</sup> It is fair to say that the higher the quality and speed of the agency review, the higher the bill for taxpayers. Is this price worth paying?<sup>125</sup> The answer is a definite “maybe”—each legislature should make the determination after careful deliberation and research.<sup>126</sup>

## X. WHAT CAN NGOS DO TO IMPROVE EULAS?

Plain language legislation might have a positive impact on improving the friendliness of EULAs, but the greatest impact can be made by non-governmental organizations (“NGOs”) dedicated to this mission.<sup>127</sup> NGOs

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<sup>121</sup> See Lloyd, *supra* note 114, at 690-94.

<sup>122</sup> *Id.* at 693.

<sup>123</sup> See E. STOKEY & R. ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 272-86 (1978).

<sup>124</sup> See Bates, *supra* note 100 (proposing that all standard form consumer contracts be pre-approved by the FTC).

<sup>125</sup> See generally WILLIAM A. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003).

<sup>126</sup> See Millus, *supra* note 120.

<sup>127</sup> Cf. Gomulkiewicz, *De-bugging Open Source Software Licensing*, *supra* note 39, at 100-03

play an important role in the information economy and come in many shapes and descriptions.<sup>128</sup> For example, technical standards organizations<sup>129</sup> have designed many key technologies of the Internet<sup>130</sup> and World Wide Web.<sup>131</sup> Groups such as TRUSTe<sup>132</sup> were formed to improve the practices for gathering and using private information on the Web. Even traditional consumer advocacy organizations such as Consumers Union<sup>133</sup> have taken their work into cyberspace.

The Web is a powerful setting for NGOs whose primary mission is education or advocacy.<sup>134</sup> Not only does the Web make it easy for potential purchasers to find information, it makes it easy for educators and advocates

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(proposing a standards organization to improve open source license form contracts); Merges, *Contracting into Liability Rules*, *supra* note 66; Rosenfeld, *supra* note 72, at 53 (proposing a public interest metasite for providing pricing information).

<sup>128</sup> "Non-governmental organizations (NGOs) are private organizations (associations, federations, unions, institutes, groups) not established by a government or by intergovernmental agreement, which are capable of playing a role in international affairs by virtue of their activities, and whose members enjoy independent voting rights. The members of an NGO may be individuals (private citizens) or bodies corporate. Where the organization's membership or activity is limited to a specific State, one speaks of a national NGO and where they go beyond, of an international NGO. There is some controversy as to whether an NGO has to be international, permanent and non-profit-making. Proper classification of NGOs is also lacking. In terms of their activities, there are, generally speaking, two kinds of NGOs: those with non-profit, i.e. idealistic, objectives, and those with economic aims . . ." Hermann H.-K. Rechenberg, Non-Governmental Organizations, in 3 *Encyclopedia of Public International Law* 612 (R. Bernhardt ed., 1997). See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 *MICH. J. INT'L L.* 183, 185-86 (defining NGOs). Well known NGOs include Amnesty International and Medcins Sans Frontieres. See generally Stephan Hobb, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations*, 5 *IND. J. GLOBAL LEGAL STUD.* 191 (1997) (discussing various activities undertaken by NGOs in the international arena).

<sup>129</sup> See Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 *CAL. L. REV.* 1889, 1907 (2002).

<sup>130</sup> See Internet Engineering Task Force, *Overview of the IETF*, at <http://www.ietf.cnri.reston.va.us/overview.html> (last visited July 27, 2004).

<sup>131</sup> See World Wide Web Consortium, *About the World Wide Web Consortium*, at <http://www.w3c.org/consortium> (last visited July 27, 2004).

<sup>132</sup> See TRUSTe website, at <http://www.truste.org> (last visited July 27, 2004).

<sup>133</sup> Consumers Union is the most prominent consumer advocacy organization. See *id.*; Sybil Shainwald, *The Center for the Study of the Consumer Movement*, 12 *J. CONSUMER AFFAIRS* 393, 393 (1978). Other consumer-related NGOs include Center for Auto Safety, Consumer's Choice Council, and Information Technology Industry Council. Commercial businesses also provide specialized consumer information, such as Carpoint and Edmunds Car Buying Guide for automobiles, and C/NET and ZDNet for computers and electronics. See also Loree Bykerk & Ardith Maney, *U.S. CONSUMER INTEREST GROUPS* (1995).

<sup>134</sup> The World Wide Web is a particularly effective way to reach consumers. See Jim Guest, *Consumers and Consumerism in America Today*, 36 *J. CONSUMER AFFAIRS* 139, 139-41 (2002) (reporting that in 2002 ConsumerReports.org had reached the mark of 830,000 subscribers).

to convey it.<sup>135</sup> Using the Web, an NGO could be a powerful vehicle for making licensing more user-friendly. The EULA NGO could make licensing more user-friendly in the following ways:

- \* Make EULAs available for review pre-purchase;
- \* Explain key license terms in plain language;
- \* Provide detailed commentary on each license term for those who want additional information;
- \* Serve as a forum to discuss EULAs;
- \* Identify concerns and recommend improvements to EULAs;
- \* Promote licensing best practices.

The sections below elaborate on these points.

#### A. *Pre-Transaction Disclosure of EULA Terms*

One criticism of so-called “shrink wrap licenses” is that consumers pay for the software before they can see the license (because the EULA is enclosed in the box, behind the plastic wrapper). Even though most software publishers give a refund<sup>136</sup> to customers who do not agree to the EULA, the process puts a burden on the consumer that would be best to eliminate and makes it challenging to “comparison shop” for better license terms. If a EULA NGO could become a central repository<sup>137</sup> for EULAs for common software products, then those consumers who wish to review EULA terms prior to purchase could easily do so.<sup>138</sup>

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<sup>135</sup> John King Gamble & Charlotte Ku, *International Law—New Actors and New Technologies: Center Stage for NGOs?*, 31 LAW & POL’Y INT’L BUS. 221, 232 (2000) (“New technologies such as the Internet have created enormous opportunities for NGOs. Enterprising individuals with little institutional infrastructure beyond a computer can mobilize thousands of people over huge distances.”); Rona Nardone, Note, *Like Oil and Water: The WTO and the World’s Water Resources*, 19 CONN. J. INT’L L. 183, 193 (2003).

<sup>136</sup> See *Adobe Sys., Inc. v. Stargate Software, Inc.*, 216 F. Supp. 2d 1051 (2002); U.C.I.T.A. § 211 (1999).

<sup>137</sup> Some EULAs may be copyrightable. However, there is a strong argument that hosting EULAs for educational purposes is a fair use under the Copyright Act. See 17 U.S.C. § 107 (2000).

<sup>138</sup> See *id.*

## B. *Education*

Most software users do not care to read EULAs,<sup>139</sup> yet they do want to know what the EULA provides. In other words, users want to know what the EULA says without reading it.<sup>140</sup> By providing an easy-to-read executive summary of each EULA, a EULA NGO could explain the gist of the EULA in an accessible manner.<sup>141</sup> For those users who want to know more about a given term, the EULA NGO could provide a hypertext link to a detailed commentary and additional information that might assist the user's understanding.

Consumers<sup>142</sup> highly value evaluations<sup>143</sup> produced by independent third parties.<sup>144</sup> The most useful information is provided by organizations that are rigorously objective<sup>145</sup> in their evaluations.<sup>146</sup> Evidence suggests that there are far too few organizations providing objective consumer product information.<sup>147</sup>

## C. *Forums, Feedback, and Best Practices*

The EULA NGO could provide constructive feedback to software publishers about how to improve their EULAs and licensing practices. The EULA NGO could host listservs and chat room discussions about EULAs. The information provided in these forums should provide useful information to software publishers about how to improve their EULAs. The EULA NGO's staff might also offer its licensing "best practices," such as how to

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<sup>139</sup> See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1217 (2003).

<sup>140</sup> See *id.* at 1214.

<sup>141</sup> Software Publishers are reluctant to provide such summaries because they believe they will be accused of hiding any terms that they choose not to put in the summary.

<sup>142</sup> See generally J.D. FORBES, *THE CONSUMER INTEREST: DIMENSIONS AND POLICY IMPLICATIONS*, 89-96 (1987); ROBERT N. MAYER, *THE CONSUMER MOVEMENT: GUARDIANS OF THE MARKETPLACE*, 19-25 (1989); Michael Hornsby-Smith, *The Structural Weaknesses of the Consumer Movement*, 9 J. CONSUMER STUDIES AND HOME ECON. 291 (1985); Iain Ramsay, *Consumer Law and the Search for Empowerment*, 19 CANADIAN BUS. L. J. 397 (1991).

<sup>143</sup> See James Mann & Peter Thornton, *Consumerism in Perspective*, 12 EURO. J. MARKETING 253, 254-57 (1975).

<sup>144</sup> See Eovaldi, *supra* note 42, at 1238.

<sup>145</sup> To be useful to a court, the EULA NGO's information must be unbiased and authoritative. See *ACTV, Inc. v. Walt Disney Co.*, 346 F.3d 1082, 1088-1091 (Fed. Cir. 2003).

<sup>146</sup> See Howard Beales et al., *Consumer Search and Public Policy*, J. CONSUMER RESEARCH 11, 19-22 (1981).

<sup>147</sup> See Eovaldi, *supra* note 42, at 1239.

enter into enforceable EULAs and how to improve the friendliness of a particular EULA. This advice would be especially useful to small licensors.

Over time, the EULA NGO will become a significant source of information about particular EULAs. The public record created by the commentary and user feedback, and the software publisher's reaction to it creates a useful body of testimony about the EULA, especially the software publisher's efforts to improve it (or not improve it, as the case may be) in the face of critical commentary and user feedback. The EULA NGO's record could provide a history of good faith and good citizenship on the part of a software publisher or a history of ignoring constructive feedback.

The EULA NGO will create and maintain a significant body of extrinsic evidence that could be useful in resolving disputes. The extrinsic materials may be admissible in an administrative action or litigation.<sup>148</sup> Should litigation occur, the availability of the public record created and maintained by the EULA NGO should help expedite the discovery process and could help the court resolve the case.<sup>149</sup>

The primary and desired effect of the public record, however, should be to encourage software publishers to improve EULA friendliness *without* litigation or administrative action.<sup>150</sup> At present, software publishers get public feedback sporadically via flame mail<sup>151</sup> and negative comments from the PC press or analysts.<sup>152</sup> The EULA NGO can provide detailed, expert feedback on a regular basis, with consistent follow-up on new EULAs and "bug fixes" to older ones.

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<sup>148</sup> The materials maintained by the EULA NGO may be introduced through expert testimony. The Federal Rules of Evidence permit expert testimony on matters involving scientific, technical, or specialized knowledge if the evidence would assist the trier of fact in understanding the evidence or determining a fact in issue. FED. R. EVID. 702. Generally, expert testimony is admissible to educate the court, and the trier of fact is given broad latitude to determine how much weight it should be accorded. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

<sup>149</sup> See, e.g., *ACTV, Inc. v. Walt Disney Co.*, 346 F.3d 1082 (Fed. Cir. 2003). In *ACTV*, the parties offered conflicting "Requests for Comments" from the World Wide Web Consortium to interpret a patent claim. The court stated that "[T]here is no general prohibition on the use of publications from standards-setting organizations to aid in the ordinary and customary meaning of technical terms. Where such a document reflects common usage by those skilled in the relevant art, the document may indeed be an appropriate reference." The court, under the facts of the case, chose not to admit the Requests for Comments because they did not reflect common usage.

<sup>150</sup> See Julie Teel, *Rapporteur's Summary of the Deliberative Forum: Have NGOs Distorted or Illuminated the Benefits and Hazards of Genetically Modified Organisms?*, 13 *COLO. J. INT'L ENVTL. L & POL'Y* 137, 152 (2002) ("Even if government decision makers are not persuaded, NGOs can still affect corporate behavior without achieving regulatory reform.").

<sup>151</sup> See DAVID BRIN, *THE TRANSPARENT SOCIETY* 165-70 (1998).

<sup>152</sup> See Gomulkiewicz, *The License Is the Product*, *supra* note 2, at 898-899.

## CONCLUSION

End user license agreements often contain valuable information, but hardly anyone reads them. Creating more readable EULAs improves the chances that people will read them and learn something when they do. Software publishers can create more readable EULAs if they make this a top priority, apply the right organizational process, and retain lawyers who are taught to draft readable licenses. Technology such as XML and shopbots can help users find useful information about licenses even if the EULAs themselves are not particularly readable, but this technology is years away from widespread deployment.

So how can users get the information from EULAs that they need without actually reading them? The answer is that someone needs to provide the information in a form that users can easily retrieve and understand. An organization dedicated to this mission could do it well, as a service to software users and as a catalyst to make licensing more user-friendly.